

**COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY
DIVISION OF WATER QUALITY PROGRAMS
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Subject: Guidance Memorandum Number 06-2014

Revisions to the Virginia Water Protection General Permits 9 VAC25-660, 9VAC25-670, 9VAC25-680, 9 VAC 25-690 (Effective August 1, 2006)

To: Regional Directors

From: Ellen Gilinsky, Ph.D., Director



Date: October 25, 2006

Copies: Deputy Regional Directors, James Golden, Richard Weeks, Regional and Central Office Water Protection Permit Managers and Program Staff

Summary:

The Virginia Water Protection General Permits were first promulgated in October 2001 and revised in January 2005. The permit regulations had a life of five years and were scheduled to expire August 1 (WP3 for Transportation projects) and October 1 of 2006 (WP1 for impacts less than one-half acre, WP2 for utility projects, and WP4 for development and mining projects). In anticipation of the impending expiration, the regulations underwent a regulatory review and subsequent revisions were made to clarify terminology and intent, correct inconsistencies between the general permits and the main regulation, to improve program efficiencies and processing. The regulations were then extended for an additional 10 years with an expiration date of August 1, 2016. The purpose of this guidance is to summarize key changes to the general permits (GPs) and discuss transition issues between old and new regulations.

Electronic Copy:

An electronic copy of this guidance in PDF format is available for staff internally on DEQNET, and for the general public on DEQ's website at: <http://www.deq.virginia.gov>.

Contact information:

Please contact Brenda Winn, Virginia Water Protection Permit Environmental Specialist, at (804) 698-4516 or bkwin@deq.virginia.gov if you have any questions about the revised VWP General Permits.

Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any particular method for the analysis of data, or establishment of permit conditions.

Revisions to the Virginia Water Protection General Permits 9 VAC 25-660, 9 VAC 25-670, 9 VAC 25-680, and 9 VAC 25-690

(Effective August 1, 2006)

Background:

Four Virginia Water Protection General Permits (GPs) were first promulgated in October 2001. Interim revisions were made to all four GPs in 2004, which became effective January 26, 2005. The permits had a life of five years and were scheduled to expire August 1 (WP3) and October 1 (WP1, WP2, and WP4) of 2006. With the impending expiration, the regulations underwent a regulatory review and subsequent revisions were made through the APA process. These revisions became effective and superseded all previous general permit regulations on August 1, 2006.

Revisions:

Section 10 – Definitions

1. In Section 10, Definitions, there were additions and deletions made to several definitions to be consistent with the main VWPP program regulation and with Section 404 CWA terms. Important changes included “streambed” and “phased development” as it is used in § 80 (Notice of Planned Changes).

Section 20 – Purpose; delegation of authority; effective date of VWP general Permit

2. The effective period of the regulations was increased to 10 years. The permit regulations will expire in August 2016. This would not preclude any interim reviews and revisions as necessary.
3. The permit authorization period was increased to seven years for General Permits WP2, WP3 & WP4. Increasing the authorization period by two years will allow permittees additional time to complete their mitigation obligations, which was often a reason for permit extensions. No change was made to the three-year authorization period for WP1.

Section 30 – Authorization to impact surface waters

4. The thresholds of coverage for permitting impacts to surface waters were amended, separating and providing specific thresholds for wetlands or open water, versus stream impacts (previously combined all together as “surface waters”). Stream impacts are no longer converted to an acreage and applied to the usage threshold acreage. These thresholds apply to temporary and permanent impact and are as follows:

WP1: less than ½ acre wetlands or open water, and up to 300LF streambed
WP2: up to 1 acre wetlands or open water, and up to 1,500 LF streambed
WP3: up to 2 acres wetlands or open water, and up to 1,500 LF streambed
WP4: up to 2 acres wetlands or open water, and 1,500 LF streambed

5. The distinction between perennial and nonperennial streams was eliminated and instead the term “stream bed” is used for determining linear footage coverage under the general permits (Section 30 A). This change was made to eliminate difficulties that led to disputes and time delays in permit processing. Use of the term “stream bed” is also consistent with terminology the Corps uses, and does not give the erroneous impression that intermittent streams are less important than perennial streams in terms of their water quality functions.

Section 50 – Notification

6. This section clarifies the provision regarding impacts to deed-restricted wetlands. Coverage of impacts to wetlands already protected by any type of protective covenant (i.e., deeds, easements, etc.) is allowed under the general permits. However, if the deed restriction was created as part of a prior permit mitigation package and is now slated for impact, then the applicant must complete a full application with mitigation for the previously protected wetlands.
7. The revision now states that impacts to wetlands/open waters/streams, protected by deed restrictions or similar protective instruments imposed by previous permit actions, require review and may require mitigation for the area formerly protected, regardless of size. If the deed-restricted area is less than 1/10 acre, then no fee would be required per the fee regulation even though a full application is required.
8. The revisions now include a requirement that reporting-only applications (§ 50 – Notifications) must include a location map (§ 60 B 9), except for VDOT-administered projects (see #9 below), and must disclose if protective instruments apply to impact areas (§ 60 B 20). (The revision prohibits use of reporting-only authorizations for impacts to deed restricted areas; a full permit application is required per #6 above.
9. In WP3, Section 50 A 2 a excludes VDOT from the requirement to provide a detailed project location map. Through an MOU with DEQ, VDOT provides a detailed monthly spreadsheet for reporting-only projects, with sufficient information to locate the projects

Section 60 – Application

10. Section 60 B 1 was modified to state that cross-sectional or profile sketches *may* be required.
11. A clarification was added to Section 60 B 19 that the application fee for stream impacts is based upon aerial measure (acreage).

12. Section 60 B 20 was added to require the applicant to disclose if any surface waters within the project boundary are under protective covenant.
13. Language was added to the regulations to allow for the administrative withdrawal of incomplete applications after 180 days of application receipt (Section 60 E).

Section 70 – Compensation

14. Language in Section 70 was modified to be consistent with the main VWPP regulation (9 VAC 25-210) regarding when off-site or out-of-kind compensation is more appropriate than on-site or in-kind compensation. The applicant must demonstrate that their proposed off-site or out-of-kind option(s) is ecologically preferable to practicable on-site or in-kind compensation options. This documentation should address the type, location, functions, values of these options under consideration and how the option sufficiently compensates for the wetlands that will be impacted. Note that for WP1 this is not required as all mitigation under that general permit is to either a bank or in-lieu fee fund.

Section 80 – Notice of Planned Change

15. The length of stream bed that can be impacted under the Notice of Planned Change (§ 80 B) was increased to 100 feet (previously 50 feet) to better accommodate minor changes during construction. Wetland/open water impacts that qualify for a planned change remain at 0.25 acre. A new impact that is not associated with previously authorized activities in authorized locations within the same phase of development or within logical termini (or do not meet the other criteria in Section 80) is not considered a Planned Change but is a new impact. .
16. In WP2 and WP3, the phrase “within the same phase of development or within logical termini” was included in § 80 (Notice of Planned Changes), as the project boundaries within which changes would be considered. Logical termini is a term typically related to linear projects and represents the rational end points for a project design or corridor study and does not preclude staged construction. Related improvements within a planned facility can be evaluated broadly as one project, rather than selecting termini based on what is planned as short range improvements. This provides a clearer picture of the transportation or utility line requirements in the project area and a better understanding of the project purpose and need.
17. Provisions were added to Section 80 B that allow DEQ to require submission of a compensatory mitigation plan for additional impacts. However, the new language does not allow for increases in impacts for reporting-only authorization if the reporting-only thresholds are exceeded (i.e., ½ acre wetlands or water/ or 300 LF stream). In such instances a new permit application and fee would be required. The request must be submitted prior to initiating the expanded impacts.

Section 90 – Termination of authorization by consent

18. Section 90 4 c was amended to allow the substitution of one type of compensation with another type of compensation, because such a change is not covered under a Notice of Planned Change. Many other scenarios may qualify under this section.

Section 95 – Transition

19. Transition language was added to address how to handle applications/modifications received before or after effective date of GP renewals. See detailed discussion in the **“Permit Application and Authorization Processing During Transition Period:”** section below.

Section 100 – VWPP General Permit

20. Part I A 5 - The permit authorization period was increased to seven years for General Permits WP2, WP3 and WP4. Increasing the authorization period by two years will allow permittees additional time to complete their mitigation obligations, which was often a reason for permit extensions. No change was made to the three-year authorization period for WP1 as all mitigation is to a bank or in-lieu fund.
21. Section 100, Part I C 17, which prohibits the discharge of untreated stormwater to any surface water, was deleted. Stormwater management permitting authority was transferred from the DEQ and is now under the authority of the Department of Conservation and Recreation (DCR). While there are still conditions for compliance with temporary and permanent SWM controls per the Erosion and Sediment and Stormwater Management laws and regulations, DEQ should defer design reviews and approvals to DCR or its delegate (i.e., a local government). While it is desirable that all activities permitted through the VWPP program are in compliance with these other laws and regulations, the elimination of the above noted condition eliminates the implied requirement that every pipe, regardless of size, discharging to surface waters required treatment. Enforcement of noncompliance with these other laws and regulations that result in an impact to state waters should be coordinated with DCR and the local government to ascertain which agency should take the lead or whether one or more agencies should take enforcement action. DEQ should take the lead for compliance actions associated with specific requirements of VWP regulations and permits. If the inspector notices violations of the sediment and erosion control laws in uplands that are not impacting the wetlands or stream then refer these cases to the local sediment and erosion control office and DCR field office manager for follow up. If the inspector can document impact to the stream and wetlands then refer the case as above and issue an NOV through the Regional DEQ enforcement section on the impact. If DCR or Local E&S staff discover E&S violations during inspections and request staff assistance to determine and document impairment DEQ staff will provide such assistance.

22. Section 100, Part II A 8 clarifies a mitigation condition, requiring plantings of indigenous species, which should be in the riparian zone, not in the stream itself.

Permit Application and Authorization Processing During Transition Period:

1. Process applications and authorizations in accordance with either the general permit regulations effective January 26, 2005 or August 1, 2006, as detailed below. The following citation is the same for all four general permit regulations effective August 1, 2006.

9 VAC 25-[XXX]-95. Transition.

A. All applications received on or after August 1, 2006 will be processed in accordance with these new procedures.

B. VWP general permit authorizations issued prior to August 1, 2006 will remain in full force and effect until such authorizations expire, are revoked, or are terminated.

C. Notices of Planned Change and all other types of notification that are received by the board prior to August 1, 2006 will be processed in accordance with the VWP general permit regulation in effect at that time. Notices of Planned Change and all other types of notification to the board that are received on or after August 1, 2006 will be processed in accordance with these new procedures.

Section -95 A of each general permit regulation allows that permit applications received before August 1, 2006 (this is the initial application, not when the application is “complete”) should be processed under the old permit regulations, even if the permit authorization ends up occurring after August 1, 2006. While the old general permit regulations are no longer effective, DEQ has, in effect, incorporated the old regulation provisions through Section -95 A above. The phrase ‘new procedures’ in -95 A and C above refers to the regulation effective August 1, 2006.

Authorizations issued on or after August 1, 2006 that are based on applications received prior to August 1, 2006 will contain the 3 or 5 year expiration term and the Part I, II, and/or III conditions from the general permit regulations effective January 26, 2005. Also, the permit cover page will need to contain the old language rather than the new language (see 2005 VWP permit manual for conditions and cover page templates).

Authorizations issued on or after August 1, 2006 that are based on applications received on or after August 1, 2006, will contain the three- or seven-year expiration term and the Part I, II, and/or III conditions from the general permit regulations effective August 1, 2006. Use the conditions and cover page templates distributed to VWP staff in July 2006, until such time that the 2006 VWP permit manual is available.

If a region receives a Notice of Planned Change request after August 1, 2006 for an authorization that was issued prior to August 1, 2006, the process may occur in one of two ways: 1) the increased impacts are within the new usage thresholds, in which case, the request can be approved, and the permittee may continue with the authorized activity; or 2) the increased

impacts are not within the new usage thresholds, in which case, the request cannot be approved; the previous general permit authorization must be terminated; and the previous permit holder must reapply for a different type of VWP general permit (if applicable), or a VWP individual permit.

2. For those regional staff who want to close the loop on old, incomplete applications (prior to August 1, 2006) that have been in the CEDS system for some time, a courtesy phone call should be made to the applicant inquiring as to their intentions. If after the phone call, the applicant still hasn't taken action, then write the applicant a letter stating that DEQ has had Permit Application Number WP[#]-[##]-[#####] since [Date] (at least 180 days since initial receipt by the correct office), and if DEQ does not receive a reply from the applicant within 15 days, indicating that the applicant is still pursuing the proposed activity and will submit the requested additional info within [number of days], DEQ will withdraw the permit application. You may want to add that after the application is withdrawn, a new permit application and permit application fee will be required, that is subject to the VWP general permit regulations in effect at the time of application. Staff should consider whether or not there has been some effort on the part of the applicant between the initial application submittal and now. Also consider sending the letter by certified mail or return-receipt requested.

For those permit applications where a phone call has been made and/or a letter is sent, be sure to record the necessary facts in CEDS (Documentation Screen at a minimum).

If DEQ does not receive a response from the applicant in the time allotted, document CEDS and move the permit record to History.

CEDS Data Entry:

In the interim between August 1, 2006 and the release date of the CEDS VWP screen upgrades, the following procedures will apply for entering general permit authorization records into CEDS.

Beginning August 2, 2006, the General Information screen in the VWP General Permit module will contain a drop-down list of choices for the Permit Term field. This field will no longer automatically populate once you choose a Permit Type. For the Permit Term field, choose either three, five, or seven years based on the processing procedures detailed in this guidance memorandum. A term must be entered before moving the record from the Application phase to the Active phase. The choice of zero years (0) in the Permit Term field was used historically for No Permit Required (NPR) actions; since staff should not be entering NPR actions into CEDS any longer, do not use the 0 permit term.

Beginning August 2, 2006, the general permit Impacts-Channel screen will appear slightly different. DEQ will no longer be tracking stream impacts as perennial/intermittent, but rather as "stream bed". Therefore, the field name for perennial was changed to "Stream Bed / Perennial Linear Displacement (linear feet):" until the CEDS upgrades can be made and the backlog of entering permit authorization records can be caught up. When entering a permit authorization record under the old regulation scheme (as detailed in this guidance memorandum), complete both perennial/nonperennial linear displacement rows of data fields*. When entering a permit

authorization record under the new regulations, just use the “Stream Bed / Perennial Linear Displacement (linear feet):” row of fields*. The program assumes that the data entered this way represents all stream bed impacts whether perennial or nonperennial. Also, the Compensated field in both rows should contain the amount of compensation being received in linear feet for the permitted impact.

**It is not necessary to complete the Acreage field unless you want to use it to determine the permit application fee.*